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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

314-693

No. 307

NEWARK MORNING LEDGER COMPANY, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Newark Morning Ledger Company, respectfully petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree of said Court entered on rehearing on May 2, 1941 (R. 67-68)[1], modifying and enforcing as modified an order of the National Labor Relations Board (hereinafter called the "Board") which directed petitioner to

[1] The symbol "R." refers to the Transcript of Record. The portion of the record printed as an appendix to the Board's brief in the Court below is designated as "Bd. App."; the appendix to respondent's brief in the Court below as "Resp. App."; Board exhibits are referred to as "Bd. Ex." and respondent's exhibits as "Resp. Ex." Those portions of the record contained in the stenographic transcript but not printed in either appendix are designated by "Tr."

cease and desist from certain unfair labor practices under the National Labor Relations Act (hereinafter called the "Act"), 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*, and to take certain affirmative action.

A

Opinions Below

There were two opinions in the Court below, an original opinion and an opinion on rehearing. The original opinion unanimously denied the Board's petition for enforcement and set aside its order. The opinion on rehearing by divided Court completely reversed the former opinion and granted the Board's petition. Both opinions are reported in 120 F. (2d) 262 (R. 27-32, 45-66).

The decision and order of the Board (LEISERSON dissenting) which was enforced as modified by the decree of the Circuit Court of Appeals, is reported in 21 N. L. R. B., No. 95, in a proceeding entitled "In the Matter of Newark Morning Ledger Company and American Newspaper Guild" (Bd. App. 384-418).

B

Statement of Facts

The issues revolve about the discharge by petitioner of a single editorial employee, Agnes Fahy, on September 22, 1937. There was then in existence a collective bargaining agreement between petitioner and Newark Newspaper Guild, the duly designated bargaining representative of the editorial employees (Bd. App. 392). That contract, executed on August 12, 1937, has since been renewed each year (R. 31).

Petitioner publishes a daily newspaper in Newark, New Jersey, known as the Newark Morning Ledger. The present management acquired a bare controlling interest in

May, 1935 (Bd. App. 390), shortly after a crippling nineteen-week strike of the editorial employees and while the business was being operated by trustees appointed by the Chancery Court of New Jersey (Bd. App. 31, 32, 269, 288). Ever since, changes have been made in every department in efforts to increase revenue, improve efficiency and effect economies (Resp. Ex. 75, Resp. App. 163). Among the changes in the editorial department were changes in editorial policy, in news coverage, in style, in news presentation (Resp. App. 47, 67-69); also, the editorial personnel was shifted about and the staff reduced (Resp. Ex. 59, Bd. App. 370-372; Resp. App. 25-26) although the change from a six to a five-day week would normally entail an increase in the staff.

The need for economies which faced the new management when it assumed control, continued despite the numerous changes. For the fiscal years ending April 30, 1936, and April 30, 1937, there were operating deficits of $62,000 and $73,000, respectively (Bd. App. 377, 378, 410). Shortly after Christmas, 1936, difficulties developed with advertisers (Resp. App. 75-76), resulting in a loss in revenue (Bd. App. 410). In August, 1937, a loss of $19,000 was incurred (Bd. App. 410). With particular reference to the editorial department, there was constant criticism that the managing editor was exceeding his budget (Bd. App. 283-285; Resp. App. 76). Then in 1937 occurred a series of events which emphasized the need for further economies and adjustments. In April petitioner announced its intention to institute the five-day week by October 1st (Bd. App. 193). In May the editorial payroll was increased to match the wage scale embodied in the Guild agreement with The Newark Star Eagle, a rival newspaper (Bd. App. 193). In August, 1937, petitioner executed a collective agreement with the Guild resulting in further wage increases (Resp. App. 147; Resp. Ex. 10). A stockholder suit was instituted by the minority common stockholder and former publisher, charging, among other things, excessive pay-

rolls and expenditures (Resp. App. 150). Late in August or early September the managing editor was specifically directed to reduce the editorial payroll (Bd. App. 283-284). This was shortly before the editorial department went on the five-day schedule. These events made it necessary to reconstitute the editorial staff and to effect offsetting economies. The rewrite position held by Fahy was entirely eliminated and she and one other, a non-Guild employee, were discharged (Resp. App. 17, 64).

Regarding Fahy, for many years before the advent of the new management, she was church editor and in charge of women's political news (Bd. App. 63). Among other changes in the editorial department, petitioner, in May, 1937, discontinued these so-called "specialties" of Fahy (Bd. App. 152, 408).[2] Thereby, Fahy's duties to the extent of at least 50%, and more likely as much as 90% were eliminated (Bd. App. 87, 151-152, 221-224, 408; Resp. App. 78, 94). This led the managing editor to suggest her immediate discharge, but he was dissuaded by the city editor, who recommended that Fahy be tried out on rewrite work, to which she was accordingly assigned (Resp. App. 408; Bd. App. 152, 224-225). Six witnesses, including all of the editorial executives, testified that Fahy proved to be lacking in the qualifications for rewrite work on the Ledger, a tabloid newspaper. This testimony stands wholly uncontradicted (Bd. App. 297, 301; Resp. App. 71, 74, 79-80, 83, 89, 93-94, 95, 98-104, 107). Also, Fahy was unhappy in her new duties, she was single, and had no dependents (Bd. App. 153, 185-186). For these reasons and because she was no longer required, Fahy was one of those selected for discharge. A few days later a meeting of the Ledger Unit of the Guild was called to decide whether she was discharged for Guild activity (Resp. Ex. 12; Resp. App. 148-150) and by a ten to two secret vote, Fahy being one of the two, the Unit decided in favor of the management.

[2] In addition, Fahy did general assignment work and some occasional minor rewrite (Bd. App. 62, 63, 188, 209, 221-224, 301).

C

Summary Statement

Claiming that the discharge was due to union activity the Guild filed charges with the Board, and on March 17, 1938, the Board issued its complaint charging violations of Sections 8 (1) and 8 (3) of the Act (Bd. App. 327-330). Hearings were held from July 22, to September 2, 1938. At the close of the Board's case the complaint was dismissed insofar as it pertained to 8 (1) violations other than Fahy's discharge (Bd. App. 386). On March 23, 1940, the Board (LEISERSON dissenting) made its order directing Fahy's reinstatement with back pay and other affirmative action (Bd. App. 416-417). On September 26, 1940, the Board petitioned the Circuit Court of Appeals for the Third Circuit for enforcement of its order and thereafter petitioner duly filed an answer and cross-petition to review and set aside the Board's order. Argument was had on December 16, 1940. On February 3, 1941, that Court, composed of Circuit Judges, MARIS, CLARK and GOODRICH, filed its unanimous opinion setting aside the Board's order (R. 27-32).

On February 7, 1941, the Court below, on its own motion, ordered rehearing before the Court *en banc* (R. 32). Petitioner moved to vacate that order on the ground that it was contrary to Section 117 of the Judicial Code of March 3, 1911, 28 U. S. C. A., Section 212 (R. 44-45). This motion was denied (R. 69). Rehearing was had on February 20, 1941, before the Court *en banc*, and on April 17, 1941, the Court below, Circuit Judge CLARK dissenting, filed its opinion completely reversing its former position and directing the entry of a decree enforcing the Board's order with formal modifications (R. 45-46).

On May 2, 1941, the decree herein was entered directing, *inter alia*, Miss Fahy's reinstatement with back pay (R. 67-68).

A few days before the Court below entered its decree, this Court announced its decision in *Phelps Dodge Corporation* v. *National Labor Relations Board*, ... U. S. ....., 61 S. Ct. 845 (decided April 28, 1941). On the basis of that decision, petitioner moved in the Court below to remand the proceeding to the Board to determine the amount of back pay (R. 69-73), which motion was denied by order dated May 20, 1941 (R. 75-76).

D

Jurisdiction

The decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on May 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (43 Stat. 938; 28 U. S. C., Sec. 347).

E

Statutes

The pertinent provisions of the statutes and rules of the Third Circuit Court of Appeals involved are set forth in the Appendix, *infra*.

F

Questions Presented

1. Whether under Section 117 of the Judicial Code of March 3, 1911 (36 Stat. 1131, 28 U. S. C. A., Sec. 212), a Circuit Court of Appeals may consist of more than three judges.

2. Whether the discharge of an employee covered by a genuine collective bargaining agreement is an unfair

labor practice under Section 8 (3) of the Act, empowering the Board to institute proceedings under Section 10 (a).

3. Whether the Board's finding that the discharge of Fahy was an unfair labor practice within Section 8 (3) of the Act is supported by substantial evidence where such finding is based upon inferences opposed to the uncontroverted evidence.

4. Whether the determination by the Board, confirmed by the Court below, that there existed a public interest in this case calling for the exercise of the Board's power was not improvident, warranting review and dismissal by this Court.

5. Whether the Board should not in the first instance determine the specific amount of back pay to be awarded and, in making such computation, deduct such amount as the employee failed without excuse to earn.

6. Whether, where the only unfair labor practice found consists of the discharge of but one employee who is ordered reinstated with back pay, and where a genuine collective bargaining agreement exists with the Union, the Board may enter a blanket order restraining generally all violations of Section 8 (3) of the Act and directing affirmative action unrelated to the specific unfair labor practice found.

G

Reasons for Granting the Writ

1. *The order of the Court below* (R. 32) *setting this case down for rehearing before the Court en banc, and the order* (R. 69) *denying petitioner's motion to vacate said order for rehearing, involve the decision of an im-*

portant question of Federal law which has not been, but should be, settled by this Court, and are in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter.

The rehearing *en banc* was ordered by the Court below pursuant to its Rule 4 (1).[3] Petitioner contends that this rule contravenes Section 117 of the Judicial Code, which provides that the Circuit Court of Appeals shall consist of three judges.

This Court has recently granted certiorari on the same question in *Commissioner* v. *Textile Mills Securities Corporation,* 117 F. (2d) 62, cert. granted, ... U. S. ....., 61 S. Ct. 830 (March 30, 1941), decided by the Third Circuit. The holding in that case conflicts with the decision of the Ninth Circuit in *Lang's Estate* v. *Commissioner,* 97 F. (2d) 867, where the Court, relying on Section 117 of the Judicial Code, said:

> "Since no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number."

The theory of amendment (or *pro tanto* repeal) by implication, relied on by Judge Biggs, writing for the Third Circuit, is one that is not favored by the Courts (*U. S.* v. *Borden Co.,* 308 U. S. 188, 198; *U. S.* v. *Madigan,* 300 U. S. 500, 506; *U. S.* v. *Noce,* 268 U. S. 613, 619). It is not to be invoked unless the legislative intent is clear and manifest (*Red Rock* v. *Henry,* 106 U. S. 596, 601) and there is no other reasonable construction of the later statute (*U. S.* v. *Munday,* 222 U. S. 175, 184).

We have examined the petition for certiorari in the *Textile Mills* case and the arguments therein advanced (at pp. 17-19) apply with even greater force to the instant case where the rehearing before the Court *en banc* was ordered after a unanimous decision by a three-judge court in favor of petitioner. By its very nature and purpose, rehearing

[3] No other Circuit Court of Appeals has promulgated such a rule.

implies reconsideration by the same judges who rendered the decision sought to be reargued and precludes participation by judges who had no part in the original decision (*World's Columbian Exposition Co.* v. *Republic of France*, 96 Fed. 687, 688; *Gas Products Co.* v. *Rankin*, 63 Mont. 372, 397).

It may not be urged that petitioner was not prejudiced since two of the three judges who participated in the original hearing changed their decision on the rehearing. The fact remains that the later decision was made by five Circuit Judges who did not, under Section 117 of the Judicial Code, legally constitute a Circuit Court of Appeals.

2. *The decision of the Court below, in holding that the discharge of an employee covered by a valid existing collective bargaining agreement is an unfair labor practice under Section 8 (3), empowering the Board to proceed under Section 10 (a), involves the decision of an important question of Federal law which has not been, but should be, decided by this Court, and one which has been decided by the lower Court in a way probably in conflict with principles established by this Court.*

The mere fact that the Court below was constrained on the rehearing to completely reverse its original decision on this question almost, in and of itself, is sufficient to warrant review by this Court. However, the question involved is of such vital importance in the administration of the National Labor Relations Act, that we feel that we may justifiably discuss the issues at some length.

The Board may deal only with such acts (by statutory definition "unfair labor practices") as interfere with collective bargaining and self-organization (R. 47).[4] In its original opinion the Court below held that the discharge of Fahy was not such an unfair labor practice, pointing out that it could not "possibly have the effect of interfering

[4] *N. L. R. B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1; *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197; *Heinz Company* v. *N. L. R. B.*, 311 U. S. 514.

with, restraining or coercing the employees in exercising a right of collective bargaining which has already been fully and successfully exercised by them" (R. 31). Hence, it held that the Board did not have jurisdiction to deal with that discharge.

In its opinion on rehearing the Court below reversed its position, declaring that it had placed "too narrow a construction" on the Act (R. 46). It evolved the theory that Section 7 guarantees to employees a "continuing right" of collective bargaining and a "continuous right" of organization, after, as well as before, the signing of a particular collective bargaining agreement (R. 48). Upon that theory it held that the Board's finding that Fahy was discharged for Guild activities and that this discouraged membership in the Guild established the existence of an unfair labor practice with which the Board was empowered to deal even though the discharge occurred after the making of a concededly genuine collective bargaining agreement (R. 49).

In considering the question of the scope of the Act and the Board's power under it, we submit that it is essential to draw a dividing line between the period preceding the making of a collective agreement and the period following the making of such an agreement. For the Act does not cover the entire realm of industrial strife. It covers only the period preceding collective bargaining, and, therefore, preceding the execution of a collective agreement.

Prior to the statute the employee was remediless, except for economic action. His bare legal rights to organize and to bargain collectively were rendered valueless by the employer's legal right to refuse to bargain and to undermine and destroy employee organization. Under the Act the employee is protected from the destructive tactics of the employer. This protection is accorded for the very purpose of strengthening employee organization, to establish equality of bargaining power, and finally to achieve collective bargaining and the industrial peace which follows in its wake.

It is, therefore, during the period preceding collective bargaining that there exists the public right and the occasion for the public remedy.[5] For during that period there is no private right in the employee; he has no private remedy available to him.

The final step in the bargaining process is the making of the collective agreement (*Heinz Company* v. *N. L. R. B., supra*). Its execution marks the end of the period preceding collective bargaining. With its execution is ended the public interest, or the need for the public remedy. The period of employee helplessness is over. Equality of bargaining power has been achieved. The policy of the Act has been attained. Private rights in the employee have been created, which, we submit, supersede the public rights under the statute. Acts committed by the employer before the collective agreement are labelled "unfair labor practices". The same or similar acts after the agreement, are labelled "breach of contract". Before the contract is made the unfair labor practices are prevented by force of the statute implemented by the administrative process of the Board. After the contract is made the same acts are prevented by force of the contract implemented by the judicial process.

Congress did not legislate with respect to the period following the execution of the collective bargaining agreement, nor was there any need for it to do so. Collective bargaining was not then unknown. It had achieved peace in the industries where it was utilized[6] and the Act was designed merely to extend its benefits to industry generally. It must be assumed that Congress knew that the laws of contract were applicable to collective agreements

[5] Report of N. L. R. B. to Senate Committee on Education & Labor, 76th Cong., 1st Sess. (Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, S. 2123), p. 476; Statement of William M. Leiserson, Hearings, *supra*, p. 918 (references to source materials in this brief are, mainly, in addition to those set forth by Judge CLARK in his dissenting opinion [R. 52-66]).

[6] Sen. Rep. 573, 74th Cong., 1st Sess.

and adequately covered those rare instances where such a contract was violated.[7] We submit that this is the essence of the whole legislative scheme. The statute created no new rights. It merely made possible, by eliminating the obstacles in the way of, the attainment of existing rights. In other words, the public right has for its ultimate objective the attainment of the private right under the collective bargaining agreement.

The foregoing analysis is fully documented in the original opinion and in the dissenting opinion of Judge CLARK on rehearing (R. 52-66) which, we submit, reached the correct conclusion with respect to the scope of the Act and the powers of the Board under it.

We discuss next the theory of a continuing right of collective bargaining which is the central theme of the opinion on rehearing. A right of bargaining continuing after the execution of an agreement is a conflict in terms. Under established principles of law there can be no right of bargaining with respect to a contract already executed. Collective agreements are no exceptions. As in other contracts, bargaining ends when such a collective agreement is executed. For, as this Court has held, the contract is "the final step in the bargaining process" (*Heinz Co.* v. *N. L. R. B., supra*).

Further, a continuing right to bargain, far from promoting the policy of the Act, is actually destructive of it. It would continue, and not end, the unrest which preceded the making of the contract. This Court has declared that

[7] Rosenfarb, "The National Labor Policy and How It Works", pp. 200, 260; Teller, "Labor Disputes and Collective Bargaining", Secs. 87, 163, 165-166; International Juridical Ass'n Monthly Bulletin, Jan., 1939, p. 84; Statement of J. Warren Madden, Senate Committee on Education & Labor, 76th Cong., 1st Sess. (Hearings, *supra*), p. 204; *In re Williams Coal Co.*, 11 N. L. R. B., 579, p. 645; *In re Essex Wire Co.*, 19 N. L. R. B., 51. In a broadcast on the American Forum of the Air (Jan. 29, 1939, p. 15) Charles Fahy said: "If you are talking about breach of contract, breach of contract on the part of a union is certainly not a national evil any more than breach of contract on the part of the employers is a national evil which would cause Congress to legislate on it."

such a contract is binding on both parties (*N. L. R. B.* v. *Sands Manufacturing Co.*, 306 U. S. 332). That being so the employer has the right to rely on it as drawn. Otherwise there is no legal or practical advantage in making the agreement. Employers will decline to enter into collective agreements if the employees possess the legal right to demand modifications in disregard of their signed contract. That is not to say that an employer will refuse to discuss these matters, any more than a landlord will refuse to discuss rent reductions, or a mortgagee changes in interest rate. But to hold that the Act imposes legal compulsion to discuss changes in an existing agreement is, in final analysis, a destruction of that agreement.

Regarding the further theory of a continuous right of employee organization, the Court below errs in attributing to Congress an intent to guarantee that right "after the signing of a collective agreement as well as before". As shown above, Congress did not legislate with respect to the period following the execution of a collective agreement. Further, the right of organization is merely incidental to, and not equal with, the right of collective bargaining.[8] Where, as here, the greater right of collective bargaining exists it necessarily embraces the lesser right of organization. Finally, once a union is recognized by the making of a collective agreement with it, the almost universal practical effect is that such a union acquires organizational strength and continues effectively to represent the employees. The statute but paves the way. Illustration of this is found in this case where, after prolonged negotiation a collective agreement was made in 1937, which has been renewed every year since then.

Concerning the question of the public right versus the private right, we point out that, concededly, there was

[8] Rotwein, "Labor Law", Ch. XII, § 149, p. 142; Benedict Wolf, "The Duty to Bargain Collectively", p. 243; N. L. R. B., 3rd Annual Report, p. 108; *N. L. R. B.* v. *Sterling Electric Motors*, 109 F. (2d) 194, 198; Statement of Donald W. Smith, Sen. Comm. on Education and Labor, 76th Cong., 1st Sess., Hearings, *supra;* Statement of Charles W. Fahy, Hearings, *supra*, p. 444.

a valid agreement under which Fahy and the Guild could have procured, in their private interest, adequate and speedy private remedy through the Courts. In its original opinion the Court below held that, therefore, Fahy's discharge did not call for the exercise by the Board of the public remedy in the public interest to effect the public policy of the statute. However, on rehearing, the Court shifted its position. It held that it was not called upon to determine whether Fahy had a private right and further that the existence of such a private right in no way affected the public right or the Board's exclusive jurisdiction to enforce it.

The refusal of the Court below to concern itself with the private right and the private remedy is, we submit, basic error. For the existence of such a complete and speedy private remedy in what is wholly a private controversy, establishes a complete lack of public interest. And in the absence of such a public interest the Board does not have the power to proceed. This was the specific holding of this Court in *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, cited by this Court with approval in *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, and *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350.

The second sentence of Section 10 (a) which is quoted by the Court below (R. 50) does not support the Court's holding that the existence of the private right in Fahy did not affect the public right or the jurisdiction of the Board to enforce it. The second sentence of that section does not enlarge the grant of power contained in the first sentence which, concededly, limits the Board's jurisdiction to those unfair labor practices which interfere with collective bargaining and self-organization. Further, the intent of the second sentence is revealed by its legislative history. The Act is an outgrowth of the National Industrial Recovery Act, the administration of which was committed to a number of boards and agencies. Some of these were established by codes of fair competition, others by executive order of the President; in addition there were so-called "President Re-employment Agreements" applicable to busi-

nesses where no codes were established. As a result administration under the National Industrial Recovery Act was beset with difficulties and delays due to lack of centralization of authority. It was this condition which Section 10 (a) rectified. The legislative history makes understandable the terms "code" and "agreement" used in that section, and establishes that they refer to the codes and agreements under the earlier statute. This is confirmed by Section 8 (3) of the Act under which the closed shop is preserved despite "anything in this Act or the National Industrial Recovery Act as amended from time to time, or in any code or agreement approved or prescribed thereunder." Further, it must be considered that the Act does not repeal the National Industrial Recovery Act, but merely provides that in case of conflict between the two, the National Labor Relations Act shall prevail (Sec. 14). It follows, that the second sentence of Section 10 (a) does not, as the Court below contends, enlarge the scope of the Act or the power of the Board. It merely concentrates in the Board all of the administrative processes under the Act.[9]

There is here involved a problem of growing importance, namely, the division of responsibility between the Courts and the increasing number of administrative agencies. This calls for the separation of the administrative process from the judicial process. Only in this way can administrative law attain its proper place in the body of general law. The necessity for this "division of responsibility" has been recognized. (*Williamsport Wire Rope Company* v. *U. S.*, 277 U. S. 551; *Progressive Mine Workers of America* v. *National Labor Relations Board*, U. S. C. A., D. C., decided October 22, 1940.)

The point at which the division of responsibility occurs clearly appears from the Act. On one side is the public

[9] Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 15; Statement of Charles Fahy, Hearings, *supra*, p. 347; Report of N. L. R. B., Hearings, *supra*, p. 578; Rosenfarb, "The National Labor Policy and How It Works", p. 477; *W. L. R. B.* v. *Reuping*, 228 Wis. 473, 483.

policy of encouraging collective bargaining, the public duty of preventing unfair labor practices, and the public remedy by which this policy and duty is made effective. This is administrative and falls within the jurisdiction of the Board. Once a collective agreement is executed, the protection of the rights created by that agreement is the responsibility of the Courts. It may, in fact, be said that the whole scheme of the public function under the Act is to bring about a justiciable relationship cognizable in the courts. The Courts have carefully refrained from encroaching upon the territory assigned to the administrative agencies (*Fed. Communications Commission* v. *The Pottsville Broadcasting Co.*, 309 U. S. 134; *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206). It is at least equally important, in fact more important, that these agencies should be restrained from encroaching upon the jurisdiction and authority of the Courts.

There is here involved an important question of jurisdiction under the National Labor Relations Act concerning an important phase of administration of the federal statute. Petitioner submits that questions of such vital importance nationally should be ultimately determined by this Court.

3. *The decision of the Court below, in holding that the Board's finding that Fahy's discharge was in violation of Section 8 (3) of the Act is supported by substantial evidence, involves the decision of an important question of Federal law which has been decided by the Court below in a way probably in conflict with principles established by this Court in decisions relating to the same matter.*

What distinguishes this case is that almost wholly the evidence regarding the reasons for Fahy's discharge is uncontroverted and the Board's finding that Fahy was discharged for union activity is directly opposed to that uncontroverted evidence. By the Board's findings, it necessarily rejected petitioner's contentions that the fac-

tors in this discharge were *first,* the need for economies, *second,* Fahy's inability to satisfactorily perform her duties and her general dispensability. In none of the opinions in the Court below was the evidence reviewed.

(a) *The need for economies as an impelling factor in the discharge of Fahy*: The Board's conclusion that the need for economies was not a factor in Fahy's discharge is not only directly opposed to the uncontradicted evidence but, as well, to the Board's findings of fact (Bd. App. 410). Beginning with the taking over of a business then in receivership (Bd. App. 410) and which had just emerged from a long strike and stockholder litigation (Bd. Ex. 10, Resp. App. 131), the findings show continued and increasing losses for the succeeding years (Bd. App. 410), despite changes in all departments (Resp. Ex. 75, Resp. App. 163; 47, 67-69).

In the Court below the Board relied on two "factors" to justify its conclusion that the need for economies did not enter into Fahy's discharge.[10] There were *first* that petitioner's financial condition was not "newly arisen" and *second,* that between April, 1937, and September, 1937, petitioner hired eight editorial employees and discharged but seven.

Concerning the first, it should be obvious that the need for economies was not lessened because the financial stringency was not "newly arisen". To the contrary, continuing and persistent losses will render that need all the more urgent. Besides, many of the conditions were "newly arisen",[11] and, added to the older conditions, made

[10] Board's brief, pp. 30-31.

[11] These included difficulties with advertisers (Resp. App. 75-76); the imminent institution of the five-day week (Bd. App. 193); the increased editorial payroll to match the wage scale of a rival paper (Bd. App. 193); the additional payroll increases under petitioner's agreement with the Guild; which also called for the five-day week by October 1st (Resp. Ex. 10, Resp. App. 147); the stockholder's suit which, among other things, charged excessive payrolls (Bd. App. 283-284); and the $19,000 loss incurred for the month of August, 1937 (Bd. App. 410).

economies mandatory. They required the reconstitution of the editorial staff and resulted in instruction to the managing editor to reduce the payroll (Bd. App. 283-284). Following his instructions the managing editor discharged two editorial employees, a non-Guild member and Miss Fahy. Her job was eliminated and no one has ever been hired to do her work.

Concerning the second "factor", we submit that more than a mere count is involved.[12] It was conceded that no new rewrite employee was hired (Resp. App. 179). There are many different types of work in the editorial department. The managing editor testified that the change to the five-day week made it necessary to anticipate the need for another artist, an added man in the sports department, another man on the copy desk, and perhaps another photographer (Bd. App. 154, 194). This emphasized the necessity to effect offsetting economies and to reconstitute the staff (Bd. App. 192).

Even on the basis of mere numbers, ordinarily the change to the five-day week would entail a staff increase of approximately 20%. However, as the Board has shown, the Ledger added only one employee, representing approximately a 2% increase. Nor did the reduction of personnel stop with the discharge of Fahy. Starting in May, 1935, with a total of 51, the editorial staff was reduced to 45 by September 22, 1937, and further reduced to 38 by August 15, 1938, despite the change to the five-day week (Resp. Ex. 59, Bd. App. 370-372).

We respectfully urge that the uncontroverted evidence compels a finding that the need for economies was a vital factor in Fahy's discharge and that the Board's findings to the contrary cannot be sustained.

(b) *Fahy's inability to satisfactorily perform her duties and her general dispensability:* One of the main changes induced by the need for economies, the discontinuance of the church page and special handling of women's political

[12] Resp. App. 179.

news in May, 1937, was of utmost importance in connection with Fahy. These had been her special fields and consequently at least 50%, and more likely 90%, of her work was eliminated. Although her discharge was then considered, she was allowed to stay and was tried out on rewrite, but she proved unsatisfactory at her new assignment.

The four top executives of the editorial department (the managing editor, city editor, news editor, and head of the copy desk) testified that Fahy lacked the qualifications for rewrite work on the Ledger (Bd. App. 297, 301; Resp. App. 71, 74, 79-80, 83, 89, 93-94, 95, 100-104, 107). A fifth witness, Menagh, on this subject a Board witness, although called by petitioner, testified to similar effect, pointing out that Fahy as a "conservative" writer lacked the "sensational touch", the "smoking-up", the "imaginative writing" required by a tabloid like the Ledger (Resp. App. 98-100).[13] A sixth witness, Rogers, testified that he did not consider Fahy as qualified (Resp. App. 93-94). Not a single witness disputed that appraisal. In fact, Fahy's own testimony tends to support it.[14] Nevertheless, the Board found that Fahy was qualified and that petitioner so regarded her. In so doing, it resorted to unwarranted inferences based on untenable assumption.

The Board assumed that Fahy did a "substantial" amount of rewrite work, to petitioner's satisfaction, prior to May 18, 1937 (Bd. App. 408, 412). From this it inferred that Fahy did not lose her competence after May 18, 1937, and hence she was qualified (Bd. App. 412). The record refutes the Board's basic assumption. To begin with, prior to May 18, 1937, Fahy's special fields occupied not less than 50% and more likely 80 to 90% of her

[13] It may be suggested that because of her years of service on the church page Fahy was unable to acquire this "sensational touch".

[14] Fahy's testimony tends to corroborate petitioner's witnesses in that she stated she desired restoration to "work which I am capable of performing and have performed * * * for years" (Resp. App. 33-34), which obviously does not refer to rewrite.

time (Bd. App. 221-225; Resp. App. 78-79, 94). In addition she did "general assignment work" (Bd. App. 62) which consists mostly of reportorial duties and only "occasional", "minor" rewrite (Bd. App. 188, 209, 221-222, 301), which latter fact is obscured by the Board's use of the term "general reportorial work" (Bd. App. 412).[15] This "occasional", "minor" rewrite is vastly different from the work expected of a full-time rewrite person. In the case of the latter, a more exacting standard is called for.

Besides, other considerations made Fahy dispensable. Her position could be and was wholly eliminated and has never been restored. Also, she was single, without dependents, and admittedly unhappy in her new duties.[16]

Consistent with the Board's rejection of the uncontroverted evidence bearing on Fahy's discharge, summarized above, it has likewise rejected the uncontroverted proof of events immediately preceding and surrounding the discharge, and instead relied largely on the "background"[17] for its finding of anti-union hostility. The theory of the

[15] The difference between rewrite and general assignment is almost self-evident. In the latter the emphasis is on the gathering of news while in the former the emphasis is on the writing up of news gathered by others calling for a higher standard of literary style.

[16] Fahy's testimony revealed her unhappiness (Bd. App. 103, Resp. App. 33, 34, 131; see also Oral Argument, p. 49); her attitude was sharply reflected in her "parading" up and down the editorial room for extended periods of time (Bd. App. 103), as well as her request for time off to attend a Guild meeting "at her own expense" (Resp. App. 132) despite her knowledge that no Guild member's pay had ever been docked for time taken to attend such meeting.

[17] The background comprised conservatively 85% of the 5,000 pages of stenographic transcript. It covered a period even antedating the new management. It was originally introduced in connection with charges of Section 8 (1) violations which were dismissed at the hearing. Nevertheless, over objection, it was allowed to remain in the record (Bd. App. 390), from which Board Member Leiserson specifically dissented (Bd. App. 418) which view was concurred in by the Court below in its original opinion (R. 32).

Board seems to be that petitioner's alleged anti-union hostility of 1935 was projected over the years to the discharge of Fahy, and upon this theory, the Board inferred that Fahy's discharge was discriminatory. Petitioner respectfully urges that the events preceding and surrounding Fahy's discharge effectively breaks any possible chain of causation between the incidents of 1935 and that discharge in 1937.

Even as far back as 1935, the uncontroverted evidence discloses no hostility between petitioner and its employees comprising the Ledger Unit. Concededly there was some distrust and suspicion of the Guild leadership, but not of the Unit or its leadership. The Guild leaders were almost wholly employees, and at least in one instance an executive, of rival newspapers (Resp. App. 12, 14). Events proved that these leaders were more intent upon fomenting strikes and discord on the Ledger than bringing about the consummation of a collective agreement (Resp. App. 12, 14). This was the view not only of petitioner. It became the conviction of the Ledger Unit as well, resulting in a sharp cleavage in the organization (Resp. App. 127-131, 139, 143, 166-175). So far as relations between petitioner and the Unit are concerned, except for the first few months in 1935, they were harmonious. In fact, twice during the latter part of 1935, once in November and again in December, the petitioner and the Unit reached complete agreement upon the terms of a collective contract, but in each instance the consummation of that contract was thwarted by the Guild's flat refusal to follow the Unit's instructions (Bd. Exs. 11, 12; Bd. Ex. 15, Bd. App. 335, 392-393).

This established, without contradiction, petitioner's willingness to adopt the procedure of collective bargaining with its own employees constituting, as the Board has found, "a unit appropriate for the purposes of collective bargaining" and insuring to "employees the full benefit of the rights to self-organization and to collective bargaining and otherwise" effectuating the policies of the

Act (Bd. App. 392). And clinching this is the fact that in 1937 petitioner did execute a collective bargaining agreement once the Guild leaders ceased their obstructionist tactics.

The Guild agreement of August 27, 1937, signalizing petitioner's full compliance with the Act, bars any inference of hostility based on earlier incidents. Such inference is cancelled out by the collective bargaining agreement, the ultimate goal of the statute. This is especially true where, as in this case, the contract of 1937 has been renewed every year, evidencing the continued existence of effective employee organization and conclusively destroying any claim of union impairment.

Another incident, contemporaneous with Fahy's discharge, is of utmost importance. In accordance with the Guild constitution making it "the duty of the Unit * * * to maintain the observance or enforcement of all * * * agreements" (Resp. App. 146), there was submitted to the Ledger Unit the question whether Fahy's discharge was for Guild activity (Resp. App. 148-150). The Unit, by secret ballot and with almost complete unanimity, absolved petitioner of any impropriety in discharging Fahy. This verdict of Fahy's co-workers, the ones best acquainted with her work, her qualifications and her mental attitude, as well as with the facts surrounding her discharge, is entitled to the greatest weight. Instead it was completely ignored, the Board failing even to mention it in its decision.

Other evidence of contemporary incidents destructive of the inference of anti-union hostility based on the background of 1935 is to be found in Fahy's own testimony. She testified affirmatively that she was not discriminated against (Resp. App. 21, Bd. Ex. 10, Resp. App. 131). She was permitted to collect union dues during working hours (Resp. App. 47). She, as well as others, was given time off to attend Guild meetings (Bd. App. 100-102), and on one occasion her hours were changed to enable her to do so (Bd. App. 101-102). Her vacation was

arranged so that she could attend a National Guild convention (Bd. App. 101, 153).

Fahy's militancy was neither secret nor of short duration (Bd. App. 405-407), but she continued to retain her job even though many others lost theirs (Bd. App. 370-372), and, finally, when the dropping of the church page gave petitioner the perfect opportunity to rid itself of this militant union leader, she still kept her job.

Thus it is seen that in support of its conclusion that Fahy was discharged because of union activity, the Board has been able only to adduce facts which at most are limited in their scope to a showing that petitioner had an anti-union attitude with respect to the Guild Local. The essential fact, that her discharge in 1937 was discriminatory, is sought to be inferred from that anti-union attitude; an inference the Board is compelled to draw because there is absolutely no direct proof of a discriminatory act against her. To draw this inference, however, the Board has disregarded the uncontroverted and unimpeached evidence which showed (1) Fahy's inability to do her work; (2) petitioner's need for economies as an important factor in her discharge; (3) her own admissions that no discrimination had been practiced against her; (4) the contemporaneous decision of her co-workers and fellow Guild members to the same effect; and (5) the Guild contract of August, 1937, evidencing the end of pre-existing hostility, if any there was.

The principles established by decisions of this Court clearly demonstrate that the Board's finding that Fahy's discharge was for union activity is without substantial evidence and cannot be permitted to stand. By uncontradicted evidence petitioner showed the real reasons for her discharge, reasons that had nothing to do with her union activity. Such a discharge is not prevented by the Act (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). The fact that rules of evidence shall not be controlling under Section 10 (b) of the Act does not permit the Board to make orders that are not based on

evidence having rational probative force (*Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197). In the absence of contrary *proof* it cannot be assumed that petitioner in discharging Miss Fahy violated the Act; the propriety of that discharge must be presumed until the contrary has been established by *proof* (*Cincinnati, New Orleans & Texas Pacific Rwy.* v. *Rankin*, 241 U. S. 319, 327). The requisite proof cannot be supplied by a mere inference which is drawn in the face of direct and uncontradicted evidence to the contrary (*Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U. S. 333, 340; *Southern Railway Co.* v. *Walters*, 284 U. S. 190, 194).

4. *The decision of the Court below confirming the determination by the Board that this proceeding was in the public interest involves the decision of an important question of Federal law which has not been but should be decided by this Court, and which has been decided by the Court below in a way probably in conflict with the principles established by decisions of this Court.*

Assuming, *arguendo*, that the Board otherwise had the power to proceed in this case, we agree that this power is not to be exercised unless there is so substantial an interference with the public right as to require restraint in the public interest (R. 51). That decision, the Court below further held, rests in the discretion of the Board (R. 51).

Under the decision of this Court in *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, the existence of a public interest is a jurisdictional fact and the determination of that issue by the administrative agency is subject to complete judicial review; and where it appears that there is no public interest, this Court will dismiss the proceeding. The *Klesner* case, although arising under the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. 45), is directly applicable to the case at bar, for the National Labor Relations Act and the procedure thereunder were specifically drawn in analogy to the Federal Trade Com-

mission Act and the procedure under that statute (*Amalgamated Utility Workers, etc.* v. *Consolidated Edison Co. of N. Y.*, 309 U. S. 261; *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350).

In this case it is revealed that at the time of Fahy's discharge there was in existence a valid collective bargaining agreement. The discharge of Fahy, if discriminatory, was a violation of that agreement giving rise to a private controversy for the determination of which there existed adequate and speedy private remedies at law and in equity. Hence, there was no specific and substantial public interest calling for the Board's exercise of its powers (*Federal Trade Commission* v. *Klesner*, supra). Also, under the grievance clause of the contract itself, Fahy was accorded a further private remedy which she invoked. As a result there was submitted to the Ledger Unit, in accordance with the Guild constitution, the question whether Fahy's discharge was for Guild activity. By an almost unanimous vote the Ledger Unit determined that the discharge was not. In view of this determination by the very labor organization directly involved, we submit that there exists no public interest calling for the intervention of the Board. Emphasizing this is the fact that the original collective agreement has been renewed year after year, completely confirming that by Fahy's discharge the Guild's effectiveness was not in any way impaired either in respect of organization or collective bargaining.

Petitioner respectfully submits that on all of the facts herein it is clear that this controversy was essentially private in nature; that there was no public interest involved which called for the exercise of the public remedy. In view of this, upon review by this Court, the proceeding should be dismissed.

5. *The decision of the Court below enforcing the Board's order of reinstatement with back pay, in failing to direct (a) that the specific amount of back pay be computed by the Board, and (b) that such amounts as the*

employee failed without excuse to earn should be deducted in computing such award, involves the decision of an important question of Federal law, and which has been decided by the Court below in a way probably in conflict with principles established by this Court in decisions relating to the same matter.

The record shows that during the period between her discharge and the hearings, about a year later, the employee made absolutely no efforts to secure any other newspaper position, and that her sole attempts to secure employment of any nature were limited to two lone attempts to secure publicity jobs (Resp. App. 21, 29-31); also that petitioner's attempt at the hearing to fully probe into these efforts were hampered if not entirely prevented by the Trial Examiner (Resp. App. 29-31). The record is, of course, silent with respect to her earnings or efforts to earn money during the period of two and one-half years between the close of the hearings and the entry of the decree.

This Court held in *Phelps Dodge Corporation* v. *National Labor Relations Board*, ... U. S. ....., 61 S. Ct. 845 (decided April 28, 1941), that there should be deducted from the amount of back pay awarded such amounts as the employee failed without excuse to earn, and that the computation should be made by the Board in the first instance.

On the basis of that decision, which was handed down after the decision on rehearing in the instant case, petitioner moved in the Court below to remand this case to the Board for the purpose of computing the amount of back pay required to be paid. By order dated May 20, 1941, the motion was denied (R. 69-73, 75-76). In opposing the motion the Board urged that the *Phelps Dodge* case was inapplicable because there was no evidence that Miss Fahy had "rejected" available employment (R. 74). The Board did not, as it obviously could not on the record here, contend that Miss Fahy had made reasonably sufficient efforts to secure other employment. Thus

the question on this phase of petitioner's application was narrowed down, essentially, to what this Court had meant in the *Phelps Dodge* case when it stated that "only actual losses should be made good" and that "deductions should be made not only for actual earnings by the worker but also for losses which he wilfully incurred". Petitioner respectfully submits that losses incurred by the worker because of his failure to make reasonably sufficient efforts to secure other employment are and were so intended in the *Phelps Dodge* decision as much "wilfully incurred" as losses suffered because of his rejection of available employment.

Since the denial of petitioner's motion the Court below has apparently changed its position. We refer to *N. L. R. B.* v. *Surburban Lumber Company*, ... F. (2d) ..... (decided June 30, 1941), where the Third Circuit by unanimous opinion of the Court *en banc* fully accepted the doctrine that the discharged employee is required to make reasonable efforts to seek other work and remanded that case to the Board for determination of that issue. It cannot be urged that the Board here found Fahy's efforts to have been reasonable, for prior to the *Phelps Dodge* decision it had never even acknowledged the existence of such an obligation. Thus the affirmance of the back pay award, and the denial of petitioner's motion for remand to the Board, are directly opposed not only to the *Phelps Dodge* decision of this Court but also to the later decision of the Third Circuit itself.

Petitioner respectfully submits that the foregoing issues are of substantial public importance in the administration of the Act and were decided by the Court below in a way probably in conflict with the principles established by this Court in its decision in *Phelps Dodge Corporation* v. *National Labor Relations Board, supra.*

6. *The decree of the Court below, restraining generally all violations of Section 8 (3) of the Act and directing affirmative action unrelated to the discharge of the*

one employee, which was the only unfair labor practice found, involves the decision of an important question of Federal law and one which has been decided by the Court below in a way probably in conflict with principles established by this Court in decisions relating to the same matter.

The only unfair labor practice found being a single, isolated discharge of one employee in September, 1937 (over three and one-half years before the entry of the decree), the Court below appropriately held that a blanket restraining order would be improper (R. 51-52).

In entering the decree, however, it enjoined petitioner from:

> "1(a) Discouraging membership in American Newspaper Guild, in Newark Newspaper Guild, and in the Ledger Unit thereof, or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment or any term or condition of employment because of membership in or activity on behalf of any such labor organization" (R. 67).

Thus, although there is concededly no evidence that petitioner has discouraged membership in any labor organization of its employees other than the Guild (and the record shows that such other labor organizations do exist among petitioner's employees) petitioner is constantly under a threat of punishment for contempt in any of its dealings with such other labor organizations or such of its employees who are members of other labor organizations. Under this decree, any time petitioner discharges an employee who is a member of any labor organization other than the Guild it is immediately subject to possible contempt proceedings on the ground that the discharge was for union activity, without having first had the opportunity of defending itself against the charge of discrimination. Thus the Circuit Court of Appeals in the first instance would be called upon to decide the questions of fact and labor relations in issue. In addition,

petitioner is under the same threat of immediate contempt proceedings in any of its dealings with its other employees who are members of the Guild. Any time a Guild member is discharged or has his duties changed, the claim of discrimination may result in proceedings to punish for contempt without the necessity of a hearing before the Board as contemplated by the Act.

Finally, the form of notice required to be posted is improper. In paragraph 2 (c) of the decree there has been a departure from the Board's usual practice. It will be recalled that the Board's original form of notice was, in effect, a confession of guilt; and that after this Court expressed its disapproval in *N. L. R. B.* v. *Express Publishing Co.*, ... U. S. ....., 61 S. Ct. 693, the Board changed its practice to require a notice which stated that the employer will not engage in the conduct from which he is ordered to cease and desist and will take the affirmative action which he has been ordered to take.

Here, however, has been added the requirement that the notice contain the following statement:

> "that the respondent's employees are free to become or remain members of American Newspaper Guild, Newark Newspaper Guild, and the Ledger Unit thereof, and that the respondent will not discriminate against any employee because of membership or activity in that organization" (R. 68).

The existence of a collective agreement between petitioner and the Guild completely establishes the absence of discrimination against the Guild, and this departure from the Board's usual practice is wholly unjustified by the facts of this case and in no respect effectuates the purpose and policy of the Act.

In these respects, petitioner submits, the provisions of the decree of the Court below are improper and should be modified by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a transcript of the record in and all proceedings had in such cause, to the end that the decree enforcing the order of the National Labor Relations Board as placed in issued by the questions presented by this petition may be reviewed and determined by this Court; that said decree be set aside and reversed by this Court; and that petitioner be granted such other and further relief as may be just and proper.

Dated, July 23rd, 1941.

CHARLES GOLDMAN,
Attorney for Newark Morning Ledger Company, Petitioner.